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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1948.

No. 333

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, an unincorporated association,

Petitioner,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM E. KIRK and LOCKHEED AIRCRAFT CORPORATION, a corporation.

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

MAURICE J. HINDIN,
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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice, and to The Associate Justices of the Supreme Court of the United States:

The petitioner herein, Aeronautical Industrial District Lodge 727, an unincorporated association, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a decision of the District Court of the United States for the Southern District of California, Central Division.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 26, 1948. The Court's opinion is found at page 132 of the transcript. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925 and Rule 38, Subsection 5B of the Rules of Supreme Court of the United States.

Statutes and Regulations Involved.

The statutes and regulations involved relate to the veterans benefits under Section 8 of the Selective Training and Service Act of 1940 as amended, 50 App. U. S. C. A., Section 308, Subsection 1; Section 403, 1946 Supp. page 58; 54 Stat. 890 (1940); 58 Stat. 799 (1944).

Statement of the Case.

Petitioner, Aeronautical Industrial District Lodge 727 is an unincorporated association and at all times involved in this action was the certified collective bargaining agent of the employees of Lockheed Aircraft Corporation. Respondents herein, Campbell, Joplin and Kirk at the time of their induction into the armed services were employees of respondent, Lockheed Aircraft Corporation and were members in good standing of the petitioner, Aeronautical Industrial District Lodge 727. At the time of their induction into the armed services, a collective bargaining agreement was in effect between the petitioner union and the respondent Lockheed Aircraft Corporation covering

the conditions of employment and establishing a system of seniority rights for employees. [Tr. of Record, p. 11.]

It is not disputed that the terms and conditions of the employment of the individual respondents at the time of their induction into the armed services was covered by this collective bargaining agreement.

While the individual respondents were in military service, the petitioner Union and respondent, Lockheed Aircraft Corporation executed a new collective bargaining agreement. This agreement is referred to as the agreement of June 4, 1945. [Tr. of Record, p. 42.]

The new collective bargaining agreement of June 4, 1945 among other things, made certain changes in the seniority rights of the employees. One of the changes made, and the validity of which change is involved in this case, was that seniority for Union chairmen of various departments of respondent, Lockheed Aircraft Corporation, was established for so long as they remained Union chairmen, over the seniority of other employees irrespective of the length of service in point of time of the employees with the employer company.

After the effective date of the new agreement, to-wit: June 5, 1945, all employees of the respondent, Lockheed Aircraft Corporation then employed by the corporation were bound by the provisions of the collective bargaining agreement. The new collective bargaining agreement superseded the previous agreement.

Upon return from miltary service, individual respondents herein were reemployed. Within the first year after

their reemployment, a general lay-off occurred at the respondent, Lockheed Aircraft Corporation plant due to slackening of work and at that time, Lockheed Aircraft Corporation, in accordance with the terms of the agreement then in effect (the agreement of June 4, 1945), laid off the individual respondents and appellees, but retained the Union chairmen who had been granted top seniority under the new agreement.

The trial court held in favor of the individual respondents herein, holding in effect that said employees were entitled to be restored to their position of seniority as it existed at the time of their induction into the armed services, rather than as it existed at any subsequent time. [Tr. of Record, pp. 111 and 113.] The Circuit Court of Appeals affirmed the lower court's judgment.

Statement of Question Presented.

Where a new collective bargaining agreement is executed between a union (being the certified bargaining agent of all employees) and an employer during an employee's absence on military leave, which new agreement changes certain seniority rights created by a previous agreement, is the veteran, upon his reemployment after his military service, entitled to be restored to his exact seniority status as it existed under the agreement in effect at the date of his induction, or may his status be determined by subsequent agreements executed on behalf of all employees generally after his date of induction?

Opinions of Courts of Last Resort on This Question.

The particular question involved herein has been the subject of five decisions of the United States Courts of Appeals. The Supreme Court of the United States has not yet passed upon this particular question. Four cases have been decided by the Third Circuit Court of Appeals of the United States. These cases are as follows:

Gauweiler v. Elastic Stop Nut Corp., 162 F. 2d 448 (12 Labor Cases p. 71079), decided May 20, 1947;

Koury v. Elastic Stop Nut Corp., 162 F. 2d 544, 12 Labor Cases p. 71101;

DiMaggio v. Elastic Stop Nut Corp., 162 F. 2d 546; 12 Labor Cases p. 71103;

Payne v. Wright Aeronautical Corp., 162 F. 2d 549; 12 Labor Cases p. 71106.

The Ninth Circuit Court in the instant case squarely disagreed with the opinion reached in each of the foregoing cases decided by the Third Circuit Court of Appeals. [Tr. of Record, p. 132.] Both the opinions of the Third Circuit Court of Appeals and the Ninth Circuit Court of Appeals, while arriving at directly conflicting results, find support in the language of two recent cases decided by the Supreme Court of the United States, namely:

Fishgold v. Sullivan Dry Dock and Repair Co., 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 9631, 11 Labor Cases p. 51232;

Trailmobile v. Whirls, 331 U. S. 40.

A direct conflict therefore exists between the Third Circuit Court of Appeals and the Ninth Circuit Court of Appeals on the specific question presented by this Petition.

Reasons Relied Upon for Granting of This Writ.

1—The power of the Supreme Court to grant a Writ of Certiorari is invoked pursuant to Rule 38, Subsection 5B of the Rules of the Supreme Court in that the Ninth Circuit Court of Appeals in the instant case has rendered a decision in conflict with the decision in four cases of the Third Circuit Court of Appeals involving the same subject matter and identical questions of law.

2—The Ninth Circuit Court of Appeals in the instant case has decided an important question of Federal law which has not yet been, but should be settled by the Supreme Court of the United States, and to permit such settlement by the Supreme Court, the Writ should be granted.

3—The conflict in opinions between the Third Circuit Court of Appeals, and the Ninth Circuit Court of Appeals, each stem from an attempt by those courts of last resort to apply the decisions of the Supreme Court on the important question of veterans reemployment rights. Since the Third Circuit Court of Appeals and the Ninth Circuit Court of Appeals, have on an identical set of facts, found support in the language of the opinion of the Supreme Court in the *Fishgold v. Sullivan Dry Dock and Repair Co.* case, 328 U. S. 275, and the *Trailmobile v. Whirls*, 331 U. S. 40 case, while arriving at diametrically

opposed conclusions, final enunciation of the true application of the rules of law enunciated in those decisions should be made by the Supreme Court.

4—The question involved is one of great importance. The Supreme Court has enunciated the importance of fixing and ascertaining the rights of veterans in the leading cases of *Fishgold v. Sullivan Dry Dock and Repair Co.* and *Trailmobile v. Whirls.* Hundreds of collective bargaining contracts with employers affecting the rights of millions of employees throughout the country, have been negotiated since the enactment of Selective Training and Service Act, likewise hundreds of Union contracts executed since 1940 have contained clauses relating to the granting of top seniority to Union chairmen, it being generally recognized as a proper and legitimate form of Union security.

5—The Selective Training and Service Act of 1948 also contains provisions of the reemployment benefits contained in the Selective Training and Service Act of 1940 (Act of June 24, 1948, c. 625, subsections 9, 16, 17, 80th Congress, 2nd session).

A final decision relating to the matter of seniority rights of reemployed veterans directly affect hundreds of thousands of employees and thousands of employers throughout the country and with inductions of men into the armed services currently increasing, the question involved will continue to be of great importance for a considerable time in the future.

Conclusion.

For the foregoing reasons, and for the reasons set forth in the brief in support of this Petition presented herewith, petitioner prays that this Petition be granted, and that the aforesaid question be determind by this Court upon the granting of a Writ of Certiorari herein.

Respectfully submitted,

MAURICE J. HINDIN,
c/o Hindin, Weiss and Girard,
Counsel for Petitioner.

Certificate of Counsel.

I, the undersigned, Maurice J. Hindin, counsel for petitioner herein, hereby certify that in my judgment and opinion the foregoing Petition for a Writ of Certiorari is well founded, and that it is not interposed for purpose of delay.

MAURICE J. HINDIN.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The statements in the Petition for Writ of Certiorari presented herewith with regard to the paragraphs entitled "Jurisdiction," "Statutes and Regulations Involved," "Statement of the Case," "Statement of Question Presented," and "Opinions of Courts of Last Resort on this Question" are incorporated herein by reference thereto.

Summary of Petitioner's Argument.

1—The Supreme Court has heretofore rejected the principle of veteran's super-seniority.

2—The language of the Supreme Court in the *Fishgold* case as well as the language of the statute indicates a basic test to be applied in determining reemployment rights of veterans.

3—The decision of the Ninth Circuit Court of Appeals gives veterans a form of super-seniority not justified under the statute and the *Fishgold* case.

4—The reemployment provisions under the statute do not prevent modification or changes in Union contracts so long as such changes apply generally to all employees and do not discriminate against veterans as such.

ARGUMENT.

I.

The Supreme Court Has Heretofore Rejected the Principal of Veteran's Super-seniority.

The Supreme Court in the case of *Fishgold v. Sullivan Dry Dock and Repair Co.*, 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 963, used the following language:

> "'These guarantees are contained in Section 8 of the Act and extend to a veteran, honorably discharged and still qualified to perform the duties of his old position. (1) He has a stated period of time in which to apply for reemployment. 8(b) He is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life. (2) He must be restored to his former position 'or to a position of like seniority, status, and pay.' 8(b)(A)(B). He is thus protected against receiving a job inferior to that which he had before entering the armed services. (3) He shall be 'restored without loss of seniority' and be considered 'as having been on furlough or leave of absence' during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. 8(c) *Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the War.* (4) He 'shall not be discharged from such position without cause within one year after such restoration.'" 8(c). (Italics here for emphasis only.)

In defining the rights which the veteran has by way of seniority the Supreme Court used the following language:

> "As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. *But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services.* We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. *No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more.*" (Italics here for emphasis only.)

Likewise the Court indicated that the provisions against the discharge of employees are relative only. The Court in that connection declared as follows:

> "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that

Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year."

The test therefore, as laid down by the Supreme Court in the *Fishgold* case appears to be in substance, that a veteran is entitled to the same job and the same incidents therewith, as he would have enjoyed had he continued in the job as an employee doing the same kind of work throughout the time he was absent for military duty. In other words, he would be entitled to the same rights as he would have enjoyed had he remained on the job, and the Court definitely refused to accept the proposition that the veteran is entitled to any greater rights. In other words, it denied the veteran any greater seniority than he would have had he remained on the job. The test as applied to this case therefore, resolves itself to an examination of the rights of the individual respondents had they been on the job throughout the entire period that they were in military service.

II.

The Language of the Supreme Court in the Fishgold Case as Well as the Language of the Statute Indicates the Sound Rule to Be Applied in Determining Reemployment Rights of Veterans and Should Have Been Applied by the Circuit Court in This Case.

The Third Circuit Court of Appeals in the cases of *Gauweiler v. Elastic Stop Nut Corp.*, 162 F. 2d 448, and *Koury v. Elastic Stop Nut Corp.*, 162 F. 2d 544, and *DiMaggio v. Elastic Stop Nut Corp.*, 162 F. 2d 546 and *Payne v. Wright Aeronautical Corp.*, 162 F. 2d 549 applied what petitioner feels is the correct application of the rules of constructon enunciated by the Supreme Court in the *Fishgold* case. The Ninth Circuit Court of Appeals in the instant case arrived at a contrary result on facts substantially identical to those in the Third Circuit Court cases.

III.

The Decision of the Ninth Circuit Court of Appeals in This Case Gives Veterans a Form of Superseniority Not Justified Under the Statute Nor Under the Doctrine of the Fishgold Case.

A. All Seniority Rights Are Based on Contractual Rights Only, or on Seniority Rights Established by Law.

Employment in and of itself does not carry with it any inherent right to seniority. Seniority rights exist only by virtue of a contractual agreement or by statutory enactments. Without a collective bargaining agreement, or other contract creating employee seniority rights, an employee has no inherent right to seniority.

Elder v. New York Central Railway, 152 F. 2d 361.

In the instant case, the only rights of the individual respondents to seniority rights are based on the collective bargaining agreements executed between the petitioner and respondent, Lockheed Aircraft Corporation, and but for these collective bargaining agreements there would be no right of seniority in the individual respondents. The selective service law did not propose to create seniority rights where none previously existed by contract.

B. Employees' Rights to Seniority May Be Increased or Decreased or Changed From Time to Time by the Process of Collective Bargaining.

A Union certified for collective bargaining is the duly qualified and regular agent to represent its members and all other employees within its bargaining group and to bargain for them and to make valid contracts for them and on their behalf, and the employees are bound by the terms of such contracts.

McQuay Norris v. N. L. R. B., 116 F. 2d 748;
N. L. R. B. v. John Englehorn & Sons, 134 F. 2d 553.

The employer is likewise bound to deal with the authorized collective bargaining agent.

Pueblo Gas and Fuel Co. v. N. L. R. B., 118 F. 2d 304.

In the instant case there is no question that the petitioner was the authorized bargaining agent for its employees and for the individual respondents as members of the Union, and there is no question but that all of the employees within the bargaining unit were bound by the terms of the respective agreements.

Likewise it is not disputed that had the individual respondents been continuously employed at the respondent, Lockheed Aircraft Corporation plants on and after June 5th, 1945, rather than having been in service with the military forces, they would have been bound in all respects by the seniority provisions of the second Collective Bargaining Agreement which became effective June 5, 1945.

C. The Individual Respondents Are Not Entitled to Any Greater Seniority by Reason of Their Military Service Than They Would Have Been Entitled Had They Been Continuously Employed on the Job During the Period That They Served in Military Service.

If the true test of veterans reemployment rights is that the veteran is entitled to no greater nor lesser seniority rights than he would have enjoyed had he remained continuously at work and on the job or if he were considered as having been on furlough or leave of absence, it becomes obvious that the legal effect of the decision of the Ninth Circuit Court is to grant him a form of super-seniority over employees who were on the job continuously and also over veterans who were inducted after June 5, 1945. This is true for the reason that had the veteran remained at work instead of being in military service, or had he been actually on leave of absence or on furlough, then he would have been bound by all of the terms and conditions of the new collective bargaining agreement executed between his employer and the Union as certified bargaining agent. To permit him to return to work under conditions identical to those existing at the date of his induction, gives him a privilege and a form of super-seniority not enjoyed by his fellow employees who remained at home on the job, or who might have been on furlough or on leave of absence, nor enjoyed by veterans inducted after June 5, 1945. It is believed that this result was not intended by the Act and this position is recognized by the opinions of the Third Circuit Court. (See prior reference to the *Fishgold v. Sullivan Dry Dock and Repair Co.* case and the cases of *Gauweiler v. Elastic Stop Nut Corp., Koury v. Elastic Stop Nut Corp., DiMaggio v. Elastic Stop Nut Corp.*, and *Payne v. Wright Aernautical Corp.*)

IV.

The Reemployment Provisions Under the Statute Do Not Prevent Modification or Changes in Union Contracts so Long as Such Changes Apply Generally to All Employees and Do Not Discriminate Against Veterans as Such.

There is no question that the petitioner and the respondent, Lockheed Aircraft Corporation had the right to make modifications or changes in existing contracts, nor is there any question that the agreement of June 5, 1945, was in all respects valid and binding with reference to all employees then at work. The Circuit Court in the *Gauweiler* case, and the other cases above cited, recognizes the rule that the rights of all employees to seniority, status, and pay are determined by and dependent upon the applicable provisions of collective bargaining agreements in effect between the union and employer. The Court in the *Gauweiler* case and in the other cases decided by the Third Circuit on the same day, recognized the validity of such contracts and also recognized the applicability of the provisions of such contracts to employees on military leave. The only limitation noted by the Court was that the contract not contain discriminatory provisions against veterans. In the instant case, the contract of June 5, 1945, was applicable to all employees whether veterans or not.

The *Gauweiler* case also recognized legitimate reasons for collective bargaining agreements to provide for seniority for union officials. It would appear therefore that since the individual respondents would have been bound by all of the terms of the agreement of June 5, 1945, had they been at work at the employer's plant on and after June 5, 1945, or if they had been inducted into the armed

services after June 5, 1945, it would follow that they should be bound by the terms of the new agreement, even though they were in military service at the time of the execution of the new agreement.

The reasonableness of the petitioner's position is seen when it is considered that the individual respondents during the entire period of their reemployment received, enjoyed and accepted without complaint all of the benefits secured for them by the new collective bargaining agreement. Only when they were confronted with a single provision of the new agreement which did not please them did they demand to be restored to some of the rights they had under the old agreement, and this to the detriment of all of their fellow workers who stayed on the job, and fellow veterans who were inducted after the date of the new contract.

Conclusion.

It is therefore respectfully submitted that this Petition for Writ of Certiorari be granted and that the Court settle with finality by its judgment the conflict in the law which now exists.

Respectfully submitted,

MAURICE J. HINDIN,

c/o Hindin, Weiss and Girard,

Counsel for Petitioner.

Los Angeles, California, September 28, 1948.